(21,985.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 194.

OTTO H. BEUTLER, ADMINISTRATOR OF THE ESTATE OF JOHN FETTA, DECEASED,

vs.

GRAND TRUNK JUNCTION RAILWAY COMPANY, GRAND TRUNK WESTERN RAILWAY COMPANY, AND GRAND TRUNK RAILWAY COMPANY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 8, 1911.

1 THURSDAY, *November* 18, 1909.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Peter S. Grosscup, Circuit Judge, presiding.
Hon. Francis E. Baker, Circuit Judge.
Hon. William H. Seaman, Circuit Judge.
Hon. Christian C. Kohlsaat, Circuit Judge.
Edward M. Holloway, Clerk.
Luman T. Hoy, Marshal.

Before:

Hon. Francis E. Baker, Circuit Judge.
Hon. William H. Seaman, Circuit Judge.
Hon. Christian C. Kohlsaat, Circuit Judge.

OTTO H. BEUTLER, Administrator of the Estate of John Fetta, Deceased, Plaintiff in Error,

v.

GRAND TRUNK JUNCTION RAILWAY COMPANY, GRAND TRUNK Western Railway Company, and Grand Trunk Railway Company.

Error to the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

This case has been argued and submitted to this Court, and a question of law arises therein concerning which the Court desires the instruction and advice of the Supreme Court of the United States.

The administrator of the estate of John Fetta, deceased, brought suit against the defendant- in error, to recover damages for alleged negligence on the part of such Railway Companies causing the death of the intestate. Upon trial of the issues before a jury, these facts were established by the testimony: The decedent, John Fetta, was in the service of the defendants in error as car repairer, having
2 a place of work set apart from other departments of railroad service, in a "repair yard," enclosed by a fence which separated this yard from the operating tracks and other railway premises, with an entrance for engines and cars over a single lead or track from the operating tracks, through an opening in the fence about 25 feet wide. The repair yard was "300 to 400 feet in length and 200 to 250 feet wide" and contained five tracks, used for repairing cars and placing cars to be repaired, each connected with the above mentioned lead; and the repairing department was under the charge of a special foreman, having a "car-repairing department crew" of which Fetta was a member. As described in the testimony, Fetta and his fellow car-repairers "had nothing to do with the movement of trains, throwing switches or moving cars of the company," and "never had occasion in the course of our (their) work to come in

contact with the people who were in the operating department or connected with the movement of the trains." While Fetta was engaged on a clear day (with two other workmen), under direction of the foreman, in repairing a car standing on repair track "No. 5," in the repair yard, another car was shunted from the above mentioned lead to this "repair track," without warning, so that it struck the standing car under which Fetta was working, and caused the fatal injury for which recovery is sought. For notice that these car repairers were so engaged a signal flag was in place, in the center of track 5, between the car in course of repair and the switch in the lead, as required by rule of the defendants in error, and in plain view from the switch which was opened by the switching crew, hereinafter mentioned, to throw the colliding car into the repair track.

3 The last mentioned car was brought from the freight yards of the defendants in error by a locomotive with its engine-and-switching crew, serving in another department of the defendants in error designated as the railroad operating department, over their operating tracks, to be placed in the repair yard for repairs; and the above mentioned collision and injury resulted from negligent operation therein on the part of this engine-and-switching crew, occurring in the course and line of their service for the defendants in error, and without negligence on the part of Fetta or his fellow workmen engaged in repairing the car.

The question of law, concerning which this court desires instruction and advice, arises under the foregoing state of facts, and is as follows:

Where it appears that negligent operation on the part of an engine-and-switching crew—engaged in the service of their employer railway corporation and belonging to a department thereof designated as the railway operating department, while running a car (to be repaired) from the general railway tracks to a special yard and tracks for car-repairing purposes—caused the death of another of such employer's servants, serving in the line of his duty in repairing a car within such repair yard; and where it further appears that the servant thus killed was employed exclusively in a separate department of the railway service, designated as the car-repair department, and had no part in other railway operations, nor relation otherwise to the engine-and-switching crew and their operations in question, beyond serving in the repair department and yard under such common employer—

4 Is sufficient relation shown between the service of this employé in the car-repair department and yard, and that of the engine-and-switching crew serving in the operating department under the same corporate employer, to authorize exemption of such common employer from liability for negligent operation on the part of the engine-and-switching crew causing injury to the first mentioned employé?

This question is this day hereby certified to the Supreme Court of the United States.

5 United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten pages, numbered from 1 to 4, inclusive, contain a true copy of the question certified to the Supreme Court of the United States on the eighteenth day of November, A. D. 1909, in the case of Otto H. Beutler, Administrator of the Estate of John Fetta, Deceased, vs. Grand Trunk Junction Railway Company, et al. No. 1572, October Term, 1909, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this eighteenth day of November A. D. 1909.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

Endorsed on cover: File No. 21,985. U. S. Circuit Court Appeals, 7th Circuit. Term No. 194. Otto H. Beutler, administrator of the estate of John Fetta, deceased, vs. Grand Trunk Junction Railway Company, Grand Trunk Western Railway Company, and Grand Trunk Railway Company. (Certificate.) Filed January 28th, 1910. File No. 21,985.

8

Office Supreme Court, U. S.
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JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1911.

No. 194.

OTTO H. BEUTLER, Administrator of the Estate of John Fetta, Deceased,

vs.

GRAND TRUNK JUNCTION RAILWAY COMPANY, GRAND TRUNK WESTERN RAILWAY COMPANY and GRAND TRUNK RAILWAY COMPANY,

On a Certificate from the United States Circuit Court of Appeals for the Seventh Circuit.

Brief and Argument for Plaintiff in Error.

RAYMOND W. BEACH,
ELMER E. BEACH,
JAMES J. BARBOUR,
Attorneys for Plaintiff in Error.

CHAMPLIN LAW PRINTING CO.

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IN THE

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OCTOBER TERM, A. D. 1911.

No. 194.

OTTO H. BEUTLER, Administrator of the Estate of John Fetta, Deceased,

vs.

GRAND TRUNK JUNCTION RAILWAY COMPANY, GRAND TRUNK WESTERN RAILWAY COMPANY and GRAND TRUNK RAILWAY COMPANY,

On a Certificate from the United States Circuit Court of Appeals for the Seventh Circuit.

Brief and Argument for Plaintiff in Error.

STATEMENT.

The United States Circuit Court of Appeals for the Seventh District certifies a single question or proposition of law concerning which the court desires the instruction and advice of the Supreme Court of the United States.

The question arises under a state of facts which is fully set forth in the certificate, from which we quote as follows:

> "The administrator of the estate of John Fetta, deceased, brought suit against the defendants in error, to recover damages for alleged negligence on the part of such Railway Companies causing the death of the intestate. Upon

trial of the issues before a jury, these facts were established by the testimony: The decedent, John Fetta, was in the service of the defendants in error as car repairer, having a place of work set apart from other departments of railroad service, in a 'repair yard,' enclosed by a fence which separated this yard from the operating tracks and other railway premises, with an entrance for engines and cars over a single lead or track from the operating tracks, through an opening in the fence about 25 feet wide. The repair yard was '300 to 400 feet in length and 200 to 250 feet wide' and contained five tracks, used for repairing cars and placing cars, to be repaired, each connected with the above mentioned lead; and the repairing department was under the charge of a special foreman, having a 'car repairing department crew' of which Fetta was a member. As described in the testimony, Fetta and his fellow car repairers 'had nothing to do with the movement of trains, throwing switches or moving cars of the company,' and 'never had occasion in the course of our (their) work to come in contact with the people who were in the operating department or connected with the movement of the trains.' While Fetta was engaged on a clear day (with two other workmen), under direction of the foreman, in repairing a car standing on repair track 'No. 5' in the repair yard, another car was shunted from the above mentioned lead to this 'repair track,' without warning, so that it struck the standing car under which Fetta was working, and caused the fatal injury for which recovery is sought. For notice that these car repairers were so engaged a signal flag was in place, in the center of track 5, between the car in course of repair and the switch in the lead, as required by rule of defendants in error, and in plain view from the switch which was opened by the switching crew, hereinafter

mentioned, to throw the colliding car into the repair track.

The last mentioned car was brought from the freight yards of the defendants in error by a locomotive with its engine and switching crew, serving in another department of the defendants in error designated as the railroad operating department, over their operating tracks, to be placed in the repiar yards for repairs; and the above mentioned collision and injury resulted from negligent operation therein on the part of this engine and switching crew, occurring in the course and line of their service for the defendants in error, and without negligence on the part of Fetta or his fellow workmen engaged in repairing the car."

Certificate, pages 1, 2.

The question or proposition of law concerning which the advice and instruction of the Supreme Court of the United States is desired is:

"Where it appears that negligent operation on the part of an engine and switching crew—engaged in the service of their employer railway corporation and belonging to a department thereof designated as the railway operating department, while running a car (to be repaired) from the general railway tracks to a special yard and tracks for car-repairing purposes—caused the death of another of such employer's servants, serving in the line of his duty in repairing a car within such repair yard; and where it further appears that the servant thus killed was employed exclusively in a separate department of the railway service, designated as the car-repair department, and had no part in other railway operations, nor relation otherwise to the engine and switching crew and their operations in question beyond serving in the repair

department and yard under such common employer.

"Is sufficient relation shown between the service of this employe in the car repair department and yard and that of the engine and switching crew serving in the operating department under the same corporate employer, to authorize exemption of such common employer from liability for negligent operation on the part of the engine and switching crew causing injury to the first mentioned employe?"

Certificate page 2.

BRIEF OF ARGUMENT.

I.

A car repairer exclusively employed under a separate and special foreman in the car repair department of a railroad company whose duties never bring him in relation to or in contact with the persons comprising an engine and switching crew—exclusively engaged in a separate and distinct department known as the operating department—is not a fellow-servant with the members of such engine or switching crew.

Gilmore v. *N. Pacific R. R. Co.*, 18 Fed. 866, 870.

Pike v. *Chicago & A. R. R. Co.*, 41 Fed. 95, 99.

N. Pacific v. *Herbert*, 116 U. S. 642.

B. & O. R. R. Co. v. *Baugh*, 149 U. S. 368, 383.

Santa Fe & Pacific R. R. Co. v. *Holmes*, 202 U. S. 438.

McCabe & Steen Co. v. *Wilson*, 209 U. S. 275, 280.

Northern Pacific R. R. Co. v. *Hambley*, 154 U. S. 349.

II.

The case at bar arose in the State of Illinois, and the Supreme Court of Illinois has held in cases similar to the one at bar that the doctrine of fellow-servant does not apply. Although the state decisions

are not binding on this court, the reasoning therein may well be adopted as the law covering this particular case.

Northern Pacific R. R. Co. v. *Hambley,* 154 U. S. 361.

I. I. I. R. R. Co. v. *Otstot,* 212 Ill. 429.

Rolling Mill Co. v. *Johnson,* 114 Ill. 57.

P. D. & E. Ry. Co. v. *Rice,* 144 Ill. 227.

Haas v. *St. L. & S. Ry. Co.,* 111 Mo. App. 706, 713.

Gathman v. *City of Chicago,* 236 Ill. 9, 15.

L. E. & W. R. R. Co. v. *Middleton,* 142 Ill. 550.

Duffy v. *Kivilen,* 195 Ill. 630, 634.

ARGUMENT.

I.

A car repairer exclusively employed under a separate and special foreman in the car repair department of a railroad company whose duties never bring him in relation to or in contact with the persons comprising an engine and switching crew—exclusively engaged in a separate and distinct department known as the operating department—is not a fellow-servant with the members of such engine or switching crew.

The decedent, John Fetta, was a car repairer, having an enclosed place in which to work, separate and apart from the operating tracks and other railway premises. The repair department was under the charge of a special foreman, having a car repair department crew of which Fetta was a member. Fetta and his associates "had nothing to do with the movement of trains, throwing switches or moving the cars of the company, never had occasion in the course of their work to come in contact with the people who were in the operating department or connected with the movement of trains" (Certificate, p. 1). The persons, by reason of whose negligence the death of Fetta resulted, were in a separate department of the railway service, called the operating department, and were in nowise related to the deceased other than being under such common employer. They did not associate and co-operate with

the employes in the car repair department in such a manner as to in anywise bring them within the reason of the rule exempting a common employer from the consequences of the negligence of a fellow-servant.

The fellow-servant rule is an exception to the rule of "*respondeat superior,*" and began with *Priestly* v. *Fowler,* 3 Mees. & W. (Eng. 1837) and *Farwell* v. *Boston & W. R. Corp.* 4 Metc. (Mass. 1842) 49.

The reason for the rule as announced in *Farwell* v. *Boston, etc., supra,* was based upon considerations of policy, general convenience and expediency. The rule in the earlier decisions of the court was not based upon grounds of justice or principle, but on the contrary the court say:

> "The safety of each depends much on the care and skill with which each shall perform his proportionate duty, each is an observer of the conduct of the others, can give notice of any misconduct, incapacity or neglect of duty and leave the service if the common employer will not take such precautions and employ such agents as the safety of the whole party may require. * * *
>
> "The safety of each will be more effectually secured than could be done by a resort to the common employer for indemnity."
>
> *Farwell* v. *Boston & W. R. Corp.* 4 Metc. 49, 59.

The conditions prevailing in 1842, at the time this rule was announced, have changed, railroads were then in their infancy and were only a few miles in length, the locomotives were many times lighter than

now, the speed of the trains was slow, their schedules were simple, the employees might easily become personally acquainted each with the other. All of these earlier conditions have now changed, the complexity and variety of modern mechanism, the extent and gigantic proportions of manufactures or even of a single railway render it impracticable, not to say impossible, that a new man should be so informed that he might know his danger and calculate his risks. We have now our complicated railroad system with its many thousands of employes who are not only strangers to each other, living in many cases hundreds of miles apart, but who have no opportunity of acquiring knowledge as to each other's capacity. The operation of these enterprises would not be possible if each employe should set himself up as a judge of the qualifications of his fellow employes. The Interstate Commerce Commissioner's Report for 1903 shows the number of passengers killed during the year ending June 30th was slightly over 300, while the number of railway employes killed was more than three thousand. More than 90 per cent of the casualties were of a kind which according to the opinion in *Farwell* v. *Boston, etc, supra,*

> "On grounds of expediency relieves the employer from liability, even in cases of negligence, unless such negligence was that of a superior servant."

In view of the changed conditions, the reason for the rule based upon "grounds of expediency" in the fellow-servant rule announced in the *Farwell* case and followed and elaborated upon by many subse-

quent decisions fails, and, therefore, the rule itself should fail or be modified to suit present conditions. Indeed this necessity has been recognized in more recent judicial decisions and in legislative enactments in the various states.

In *Gilmore* v. *Northern Pacific R. R. Co.*, 18 Fed. 866, page 870, the court say in discussing this rule:

> "But in the progress of society and the general substitution of ideal and invisible masters and employers for the actual and visible ones of former times, in the form of corporations engaged in varied, detached and widespread operations, as in the construction and working of large lines of railway, it has been seen and felt that the universal application of the rule has resulted in hardship and injustice."

In the case at bar there was no co-operation between the deceased and the persons in the operating department of the railroad. Their usual duties did not bring them in habitual association or contact so that they might exercise a mutual influence upon each other promotive or proper caution.

The deceased and the persons in the engine-and-switching crew as shown in the statement of facts certified by the United States Circuit Court of Appeals were as distinct and separate from each other as a clerk in the general offices of the company would be distinct and separate in his employment from a crew operating a train. They did not co-operate so that each might be an observer of the conduct of the other, but in truth and in fact from the statement in the certificate, they never came in

contact with each other at all while engaged in the performance of their duties.

It was held in *Pike* v. *Chicago & A. R. Co.*, 41 Fed. 95, 99, that a bridge watchman on a railroad and the engineer and conductor of a train on the railroad, being engaged in different departments of service, and working under immediate direction of different foremen

> "did not co-operate in such a manner as to exercise an influence over each other's actions to any greater extent than trainmen and trackmen usually co-operate and * * * cannot be regarded as fellow-servants."

In *Northern Pacific Co.* v. *Herbert*, 116 U. S., 642, a brakeman in defendant's yards where cars were switched upon its tracks to have trains made up, received an injury from a defective brake, which had been allowed to get out of repair through the negligence of an employe of the defendant, who was charged with the duty of keeping the cars in order. It was held upon great unanimity of authority both in this country and in England that the person receiving and the person causing the injury did not occupy the relative position of fellow-servants. On page 650 of the opinion the court say:

> "The agents who are charged with the duty of supplying safe machinery are not, in the true sense of the rule relied upon, to be regarded as fellow-servants of those who are engaged in operating it. They are charged with a master's duty to his servants. They are employed in distinct departments of service and there is no difficulty in distinguishing them, even when the

> same persons render service by turn in each as the convenience of the employer may require."

There is mutuality of risk in the doctrine of fellow-servant, and the persons employed to repair or keep railroad cars in good order are not engaged in a common employment with those who run or operate them.

The Supreme Court in *B. & O. R. R. Co.* v. *Baugh*, 149 U. S. 368, stated that a manufacturing or repair department of a railroad is distinct and separate from the operating department, and the court say on page 383 of the opinion:

> "So often times there is in the affairs of such corporations what may be called a manufacturing or repair department and another strictly operating department; these departments are in their relations to each other as separate and distinct as though the work of each was carried on by a separate corporation."

And further on page 389 of the opinion:

> "The fact is all locomotive engineers of a railroad company are in one department, the operating department."

In *Santa Fe and Pacific R. R. Co.* v. *Holmes*, 202 U. S. 438, decided in May, 1906, it was held that the negligence of a train dispatcher did not relieve the company from liability for an injury to an engineer resulting from such negligence.

In a still more recent case, *McCabe & Steen Co.* v. *Wilson*, 209 U. S. 275, it is held that a fireman on the engine of a construction train was not a fellow-servant of the foreman of the gang constructing a

bridge, which fell and caused an accident, the reason being that the fireman's work was in a separate department from that of the foreman, who was engaged in constructing a bridge, and the court say on page 280, in discussing the question as to whether the plaintiff was a fellow-servant with the foreman:

> "The plaintiff was a fireman employed on a locomotive and his work was in a separate department from that of the employes engaged in the construction of the bridge. This is not a case for the application of the doctrine of fellow-servant."

In the case at bar it appears that the deceased was not only in a separate and distinct department of service from that in which the negligent servants were employed, but also it appears that there was no habitual association or contact between the servants in these different departments, nor were they engaged in the performance of a common enterprise or employment. The deceased was constantly and solely employed in a particular place, set apart and enclosed for car repair work and removed at a considerable distance from the operating tracks upon which latter tracks the engine-and-switching crew was habitually employed.

In *Northern Pacific R. R. Co.* v. *Hambley*, 154 U. S. 349, the court say:

> "That a repairer employed in repairing tracks and culverts of the company was a fellow-servant with the engineer of a passing train,"

the reason for so holding being as announced on page 357 of the opinion that a track repairer is

> "constantly exposed to the danger of passing trains and is bound to look out for them, any negligence in the management of such trains is a risk, which may or should be contemplated by him in entering upon the service of the company. This is probably the most satisfactory test of liability."

In the case at bar it affirmatively appears in the statement of facts that the two departments were so separated and distinct from each other that the car repairers "never had occasion in the course of our (their) work to come in contact with the people who were in the operating department or connected with the movement of trains." (Certificate 1.)

Therefore, it could not be said that the negligence of the servants of the defendant engaged in running trains or cars was a risk within the contemplation of the deceased in entering upon the service of the company. The court continuing on page 357 of the *Hambley* case say:

> "If the departments of the two servants were so far separated from each other that the possibility of coming in contact and of incurring danger from the negligent performance of the duties of such other department could not be said to be within the contemplation of the person injured, the doctrine of fellow-servant should not apply."

II.

The case at bar arose in the State of Illinois, and the Supreme Court of Illinois has held in cases similar to the one at bar that the doctrine of fellow-servant does not apply. Although the state decisions are not binding on this court, the reasoning therein may well be adopted as the law covering this particular case.

The fellow-servant doctrine could not have been successfully invoked by the defendant in error had the case been tried in the state court.

In discussing the weight to be given the decisions of the state or local court, the Supreme Court say in *Northern Pacific R. R. Co.* v. *Hambley,* 154 U. S. 361:

> "While this construction given by the Supreme Court of a territory is not obligatory upon this court, it is certainly entitled to respectful consideration, and in doubtful cases may well be accepted as turning the scale in favor of the doctrine there announced."

In *I., I., I. R. R. Co.* v. *Otsott,* 212 Ill. 429, a hostler whose duties required him to run an engine from the depot to a roundhouse is held not necessarily as a matter of law a fellow-servant of a sectionman employed in the yards and whose association with the hostler is accidental and not habitual, and the court says, on page 436:

> "They were employed in different departments and the work of the sectionman had no connection whatever with that of the hostler. He might never be brought into

> association with any of them; such association as there was between Munaw and the sectionman was purely accidental, resulting from the fact that they happened to be working in the part of the yards through which he passed in the performance of his duties in taking engines to and from the roundhouse at a time when he had occasion to move an engine through that portion of the yards. Under these circumstances we can not say that the evidence is such that all reasonable minds must conclude that Munaw and appellee were fellow-servants."

In *Rolling Mill Co.* v. *Johnson,* 114 Ill. 57, the court held that a laborer engaged in handling a car on a switch is not a fellow-servant with the crew switching cars in the yard, and in discussing the fellow-servant rule and the relations that must exist before the fellow-servant doctrine can apply, the court say, on page 64:

> "The idea is that the relations between the servants must be such that each as to the other, by the exercise of ordinary caution, can either prevent or remedy the negligent acts of the other, or protect himself against its consequences. * * * How can the laborer be profited by a knowledge of the usual manner of doing work in another department, if he is unable in any reasonable way, while engaged in the proper discharge of his duties and without disobedience to his immediate superiors, to influence the conduct of the laborers in that department?"

In *P. D. & E. Ry. Co.* v. *Rice,* 144 Ill. 227, the court held (see syllabus) where a section foreman, engaged with two carpenters in repairing a railroad

bridge, was injured by a freight train running upon him contrary to signal, it is proper to instruct the jury that if the section foreman and the man in charge of the train were employed in different departments at the time of the accident, and were not associated in the performance of their duties, but were wholly separated and disconnected in the performance of their duties, they were not fellow-servants, and the fact that the foreman had a right to signal the freight train approaching such bridge and that the engineer's duty was to obey the signal in no way tends to establish the relation of fellow-servants between them.

In *Haas* v. *St. L. & S. Ry. Co.*, 111 Mo. App. 706, 713, plaintiff, a track repairer, in the employ of defendant street car company, was injured by one of defendant's motormen, while traveling on a laborer's free pass by order of the foreman of his gang; held, that the plaintiff and the motorman were not fellow-servants because they were employed in separate departments of defendant's service.

In the case of *Gathman* v. *City of Chicago*, 236 Ill. 9, the departmental theory was clearly set forth; on page 15 the court say:

> "Here the injured servant was performing service in one department of the city government, and was sent by his superior officer to the bridge to make certain measurements, while the servants of the city causing the injury performed service in another department of the city government and were under the control of other superior officers, and the servants of the city handling the bridge had nothing to do with making the measurements which appellee had

> been directed to make, their duties being to care for and handle the bridge. * * * Appellee and said servants were not, therefore, necessarily co-operating together at the time appellee was injured. Neither did the line of employment or the usual duties of the appellee and the servants of the city who operated the bridge necessarily bring appellee and said servants into habitual association so that they might exercise a mutual influence upon each other promotive of the caution which would protect each other from an injury which might result from the negligence of each other."

Whether the deceased was a fellow-servant with a member of the engine and switching crew becomes a question of law when the facts are not in dispute, and all reasonable minds would readily agree as to the conclusions which should be drawn from the statement thereof in the certificate and it seems to us impossible to logically say that all reasonable minds must agree as a matter of law that the fellow-servant doctrine applies.

> "Whether two servants of the same master in any given case are fellow-servants, is a mixed question of law and of fact, and in the trial court it was a question to be considered in both aspects. It was for the court by proper instructions to explain and define the relation of fellow-servants so far as it is capable of legal definition, and for the jury in considering the evidence to determine whether the relation as thus defined in fact existed."
>
> *L. E. & W. R. R. Co.* v. *Middleton*, 142 Ill. 550.

> "It is only when the evidence is such that all reasonable minds must reach the same conclusion as to the relation existing between the em-

ployes of the same master that it may be declared as a matter of law that such servants are fellow-servants."

Duffy v. *Kivilin,* 195 Ill. 630, 634.

"The question whether the servants of a common master are fellow-servants is usually a question of fact, and never becomes a question of law unless the facts proved show such relation so clearly to exist that all reasonable minds will readily agree that such is the relation of the servants of the common master."

Gathman v. *City of Chicago,* 236 Ill. 9, 15.

In conclusion, we insist that the engine and switching crew were not as a matter of law or of fact, fellow-servants with the deceased.

Respectfully submitted,

RAYMOND W. BEACH,
ELMER E. BEACH,
JAMES J. BARBOUR,
Attorneys for Plaintiff in Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1911.

No. 194.

OTTO H. BENTLER, Administrator of the Estate of JOHN FETTA, deceased,

vs.

GRAND TRUNK JUNCTION RAILWAY COMPANY et al.

On Certificate from the United States Circuit Court of Appeals For the Seventh Circuit.

BRIEF AND ARGUMENT FOR DEFENDANTS IN ERROR.

STATEMENT.

The question of law upon which the United States Circuit Court of Appeals for the Seventh Circuit desires the instruction and advice of this court appears in the printed certificate filed in this cause and in the statement of facts preceding the brief and argument of plaintiff in error.

The trial court in holding that the deceased and the engine and switching crew were fellow-servants answered the same question in the affirmative and in so doing that court followed the law as many times declared by this court.

BRIEF OF ARGUMENT.

I.

It is well settled that persons in the service of the same employer and bearing such relations to each other and to the business they are jointly engaged in, as a switching crew and a car-repairer in the railroad yards of the master, are fellow-servants, and the master is not liable for an injury to one through the negligence of the other.

There is no intimation in the statement of facts submitted by the Court of Appeals of a violation of any personal duty which the master owed its servant, such as the duty of furnishing a safe place to work, to employ a sufficient number of men to operate the engine and car, or that those employes were not qualified to discharge their respective duties.

It must be assumed, therefore, that all proper regulations were made by the master for the safety of the deceased while he was at work on the car. For notice that these car-repairers were so engaged a signal flag was in place in the center of track 5 between the car in course of repair and the switch in the lead as required by rule of defendants in error and in plain view from the switch which was opened by the switching crew hereinafter mentioned to throw the colliding car into the repair track. (Certificate 2.) There is no charge made that the method adopted for the safety of the deceased was not reasonably safe, but the sole trouble was that the

switching crew did not heed the signal but negligently allowed the car, which was being propelled toward the one on which deceased was working, to run against it with such force that it ran over and killed him.

The duty and implied contract of the master with its servants is that it will exercise reasonable care to furnish its servants a safe place to work and shall employ competent co-servants, etc.

Where there is a general agent or superintendent having the management or control of any particular department or branch of the business, such agent takes the place of the corporation and any neglect or omission of duty in respect to his employes is the negligence of the master, for which the latter is responsible.

No claim is made that a sufficient number of men were not furnished or that all the employes who had anything to do with the repairing or moving of the cars in this freight yard were not competent men, well fitted for the business in which they were engaged. The train consisted of an engine and switching crew. This crew brought the cars in the repair yard and deceased was engaged in making repairs upon cars so brought in. All were engaged in the same work for the same common purpose and the acts of one of them would not render the defendants in error liable for an injury to the other even though they were engaged in different departments of defendant in error's service.

Randall v. *Baltimore & Ohio Railroad Co.*, 109 U. S., 478, was an action brought in the Circuit

Court of the United States for the District of West Virginia against a railroad corporation by a brakeman in its employ for personal injuries received, while working at a switch, and caused by his being struck by one of its locomotive engines; and it was unanimously held by the Supreme Court, affirming the court below, that the plaintiff could not recover, although the injury was occasioned by the negligence of the engineman in running its engine too fast, or not giving due notice of its approach. In the course of the opinion which was pronounced by Mr. Justice Gray, he said:

> "The general rule of law is now firmly established that one who enters the service of another takes upon himself the ordinary risks of the negligent acts of his fellow-servants in the course of the employment. This court has not hitherto had occasion to decide who are fellow-servants within the rule. * * * Nor is it necessary for the purposes of this case, to undertake to lay down a precise and exhaustive definition of the general rule in this respect, or to weigh the conflicting views which have prevailed in the courts of the several states; because persons standing in such a relation to one another as did the plaintiff and the engineman of the other train are fellow-servants, according to the very great preponderance of judicial authority in this country, as well as the uniform course of decision in the House of Lords, and in the English and Irish courts, as is clearly shown by the cases cited in the margin. They are employed and paid by the same master. The duties of the two bring them to work at the same place at the same time, so that the negligence of the one in doing his work may injure the other in doing his work. *Their*

separate services have an immediate common object—the moving of the trains."

Quebec Steamship Co. v. *Merchant*, 133 U. S., 375, was an action brought in the Circuit Court of the United States for the Southern District of New York by one Merchant, who was employed as a stewardess of the steamship Bermuda, belonging to the defendant company. It appeared that the ship's company consisted of thirty-two persons, divided into three classes of servants, called three departments—the deck department, the engineers' department and the steward's department. The captain, the first and second officers, the purser, the carpenter and the sailors were in the deck department; the engineers, the firemen and the stokers were in the engineers' department; the steward, the waiters, the cooks, the porter and the stewardess were in the steward's department. At the close of the evidence the defendant's counsel requested the court to charge the jury to find a verdict for the defendant on the ground that the injury sustained by the plaintiff was occasioned, if there was any negligence, by the negligence of a fellow-servant. This the court refused to do. There was a verdict for the plaintiff, and the case was brought to the Supreme Court. There it was contended that, as the carpenter whose negligence was alleged as the cause of the injury was in the deck department, those were different departments in such a sense that the carpenter was not a fellow-servant with the stewardess. But Mr. Justice Blatchford, speaking for this entire court, said:

> "The injuries to the plaintiff were caused solely by the negligence of one or the other of two fellow-servants who were in a common employment with her, and there was no violation or omission of duty on the part of the employer contributing to such injuries. Neither of her fellow-servants stood in such relation to her or to the work done by her, and in the course of which her injuries were sustained, as to make his negligence that of the employer. The case, therefore, falls within the well settled rule, as to which it is unnecessary to cite cases, which exempts an employer from liability for injuries to a servant by another servant, and does not fall within the exception to that rule which destroys the exemption of the employer when his own negligence contributes to the injury, or when the other servant occupies such a relation to the injured party or to his employment, in the course of which her injury was received, as to make the negligence of such servant the negligence of the employer."

In *Central Railroad Co.* v. *Keegan*, 160 U. S., 267, this court by Mr. Justice White held:

> "In *Potter* v. *N. Y. Central & Hudson River Railroad*, 136 N. Y., 77, employes of a railroad company, while switching cars in the company's yard, under the direction of a yardmaster, shunted a number of cars onto a track so that they collided with a car being inspected, and caused the death of the inspector. It was claimed that proper and reasonable care required that there should have been a brakeman on the front of the cars to control in an emergency their motion, when detached from the engine. In the absence of allegation of proof to the contrary, the court presumed that competent and sufficient servants were employed, and proper regulations for the management of the

business had been established and observed (p. 82): 'It is quite obvious that the work of shifting cars in a railroad yard must be left in a great measure to the judgment and discretion of the servants of the railroad who are entrusted with the management of the yard. The details must be left to them, and all that the company can do for the protection of its employes is to provide competent co-servants, and prescribe such regulations as experience shows may be best calculated to secure their safety.'

"We adopt this statement as proper to be applied to the case at bar. A personal, positive duty would clearly not have been imposed upon a natural person, owner of a railroad, to supervise and control the details of the operation of switching cars in a railroad yard; neither is such duty imposed as a positive duty upon a corporation; and if O'Brien was negligent in failing to place himself or some one else at the brake of the backwardly moving cars, such omission not being the performance of a positive duty owing by the master, the plaintiff in error is not responsible therefor."

So in the case at bar, the cause of the accident was the negligence of the engine and switching crew, and such negligence in this respect was the negligence of fellow-servants for which the defendants in error are not liable.

It is argued by counsel that the doctrine of fellow-servant could not apply, because the deceased was in what is known as the repair department, and the engine and switching crew were in what is known as the operating department. The same contention was made in *Northern Pacific Railway Co.* v. *Dixon*, 194 U. S., 345, where a member of the train crew was injured by reason of the negligence

of a telegraph operator in reporting a train order. The argument was answered by Mr. Justice Brewer, speaking for the court, who said:

> "Another suggestion is, that the doctrine of fellow-servant does not apply where the servant injured and the servant guilty of the negligence are engaged in separate departments of service. In *Northern Pacific Railroad* v. *Hambly,* 154 U. S., 349, a common laborer was employed under the direction of a section boss in building a culvert on the line of defendant's railroad, and while so employed was struck and injured by a moving passenger train, the injury resulting solely through the misconduct and negligence of the conductor and engineer of the train. It was held that they were fellow-servants, and in respect to this suggestion it was said (p. 357):
>
> "'As a laborer upon a railroad track, either in switching trains or repairing the track, is constantly exposed to the danger of passing trains, and bound to look out for them, any negligence in the management of such trains is a risk which may or should be contemplated by him in entering upon the service of the company. This is probably the most satisfactory test of liability. If the departments of the two servants are so far separated from each other that the possibility of coming in contact, and hence of incurring danger from the negligent performance of the duties of such other department, could not be said to be within the contemplation of the person injured, the doctrine of fellow service should not apply.'
>
> "Applying this to the case before us, manifestly the work of the fireman and the operator brought the parties closely together in the matter of the movement of the trains. Dixon knew that any negligence on the part of the operator might result in injury to him, and must have

> contemplated such possibility when he entered the service of the company."

So here, the deceased was exposed to the negligence of the switching crew and the possibility of injury from that crew was apprenhended by those engaged in car repairing and guarded against by the placing of the flag as a warning and signal of danger, in accordance with a rule of defendants in error.

In *Northern Pacific Railroad* v. *Peterson*, 162 U. S., 355, held:

> "The rule is that in order to form an exception to the general law of non-liability the person whose neglect caused the injury must be 'one who was clothed with the control and management of a distinct department, *and not a mere separate piece of work in one of the branches of service in a department.*' This distinction is a plain one, and not subject to any great embarrassment in determining the fact in any particular case. * * *
>
> (P. 356:) "The meaning of the expression 'departmental control' was again and very lately discussed in *Northern Pacific Railroad* v. *Hambly*, 154 U. S., 349, where it was held, as stated in the headnote, that a common day laborer in the employ of a railroad company, who, while working for the company under the orders and direction of a section boss or foreman on a culvert on the line of the company's road, receives an injury through the neglect of a conductor and an engineer in moving a particular passenger train upon the company's road, is a fellow-servant of such engineer and of such conductor in such a sense as exempts the railroad company from liability for the injury so inflicted.

"The subject is again treated in *Central Railroad* v. *Keegan*, 160 U. S., 259, decided at this term, where the men engaged in the service of the railroad company were employed in uncoupling from the rear of trains cars which were to be sent elsewhere and in attaching other cars in their place, and they were held to be fellow-servants, although the force, consisting of five men, was under the orders of a 'boss' who directed the men which cars to uncouple and what cars to couple, and the neglect was alleged to have been the neglect of the 'boss' by which the injury resulted to one of the men. This court held that they were fellow-servants, and the mere fact that one was under the orders of the other constituted no distinction, and that the general rule of non-liability applied.

"These last cases exclude by their facts and reasoning the case of a section foreman from the position of a superintendent of a separate and distinct department. They also prove that mere superiority of position is no ground for liability. * * *

"If in approaching the line of separation between a fellow-workman and a superintendent of a particular and separate department there may be embarrassment in determining the question, this case presents no such difficulty. It is clearly one of fellow-servants. The neglect for which the plaintiff has recovered in this case was the neglect of Holverson in not taking proper care at the time when he applied the brake to the front car. It was not a neglect of that character which would make the master responsible therefor, because it was not a neglect of a duty which the master owes as master to his servant when he enters his employment."

So here the negligence of the switching crew which caused the death of deceased was not the negligence

of one clothed with the control and management of the operating department of defendants in error. The case at bar therefore does not form an exception as to the general law of non-liability as above defined.

In *New England Railroad Co.* v. *Conroy*, 175 U. S., 328, held:

> "* * * we have no hesitation in holding, both upon principle and authority, that the employer is not liable for an injury to one employe occasioned by the negligence of another engaged in the same general undertaking; that it is not necessary that the servants should be engaged in the same operation or particular work; that it is enough, to bring the case within the general rule of exemption, if they are in the employment of the same master, engaged in the same common enterprise, both employed to perform duties tending to accomplish the same general purposes, or, in other words, if the services of each in his particular sphere or department are directed to the accomplishment of the same general end; and that, accordingly, in the present case, upon the facts stated, the conductor and the injured brakeman are to be considered fellow-servants within the rule."

The court, continuing, said (p. 339):

> "The rule is that, in order to form an exception to the general law of non-liability, the person whose neglect caused the injury must be one who was clothed with the control and management of a distinct department, and not a mere separate piece of work in one of the branches of service in a department. This distinction is a plain one, and not subject to any great embarrassment in determining the fact in any particular case."

In *Texas Pacific Ry. Co.* v. *Bourman*, 212 U. S., 536, plaintiff was a section hand employed by defendant and working under the directions of a section foreman. When the work was finished the men were taken on board a passenger train to be carried to a station called Waggawan. In alighting from the train at this station plaintiff was injured by the negligence of his foreman in directing him to there alight, and by the negligence of the engineer in starting the train while plaintiff was in the act of alighting. The plaintiff, a section man, and the engineer of the train were in different departments of defendant's service.

This court held:

> "Both the engineer and the section foreman were fellow-servants of the plaintiff and if the plaintiff's injury was caused by the negligence of either, the law, as it many times has been declared by this court, will not permit a recovery. *Baltimore & Ohio Railroad* v. *Baugh*, 149 U. S., 368; *Northern Pacific Railroad* v. *Hambly*, 154 U. S.. 349; *Central Railroad Company* v. *Keegan*, 160 U. S., 259; *Northern Pacific Railroad* v. *Peterson*, 162 U. S., 346; *Northern Pacific Railroad* v. *Charless*, 162 U. S., 359; *Martin* v. *Atchison, Topeka & Santa Fe Railroad*, 166 U. S., 399; *Alaska Mining Company* v. *Whelan*, 168 U. S., 86; *New England Railroad* v. *Conroy*, 175 U. S., 323; *Northern Pacific Railroad* v. *Dixon*, 194 U. S., 338."

Applying these principles, it is clear that Fetta and the switching crew, although not engaged in the same operation or particular work at the time, yet they were both employed to perform duties tending to accomplish the same general purpose, and

were fellow-servants and the master is not liable for an injury to one through the negligence of the other.

REVIEW OF CASES CITED BY PLAINTIFF IN ERROR.

Northern Pacific Railroad Co. v. *Herbert,* 116 U. S., 642. In that case it was held that it was the positive personal duty of the master to furnish sufficient and safe materials, machinery or other means by which the service was to be performed and to keep them in repair and order, and as this positive duty of the master had not been fulfilled, the servant could recover.

This distinction is noticed in the case of *Railway Co.* v. *Conroy,* 175 U. S., 334.

The rule stated in *B. & O. Railroad Co.* v. *Baugh,* 149 U. S., 368, is not applicable unless the departments are so far separated from each other that the employes of each are not brought into contact with each other.

Ry. Co. v. *Dixon,* 194 Ill., 345.

In *Santa Fe* v. *Holmes,* 202 U. S., 438, it was held that a train dispatcher in promulgating orders governing the movement of trains was performing a duty which the master owed the servant. The court held (p. 441):

> "It is not denied that the train dispatcher represented the company in the promulgation of the special orders. It is, however, asserted that this representation ceased by the promulgation of the orders and that he was not required to repeat them or promulgate new ones. * * * It is the duty of a master to furnish

safe places to work in and safe instruments to work with, and of this there need be no discussion. The duty is a continuing one and must be exercised whenever circumstances demand it. * * *

"There can be no doubt of the duty of the train dispatcher in such case. His duty is clear if the circumstances call for action. Did the circumstances in the case at bar call for action? In answering this it will do no good to discuss cases. The principles of law are clear. A master must furnish a safe place for his servant to work in, and the risk the servant assumes of the negligence of a fellow-servant does not exempt from that duty. Or to put the matter more guardedly, there is no circumstance in this case which exempted from that duty. The special orders were an assurance of the company, through its train dispatcher, to train No. 4, that it could run with safety between Mellen and Franconia if it arrived at the latter station before 517."

In *McCabe & Steen Construction Co.* v. *Wilson*, 209 U. S., 275, the employes whose negligence caused the injury were engaged in providing a safe place for the fireman of an engine in which to work, a matter which could not be delegated, the court holding that the superintendent of construction in building a bridge was not a fellow-servant of a fireman engaged in the movement of a train. The court said (p. 280):

"It would be carrying that doctrine too far to hold that one employed as a fireman and engaged in the movement of a train was a fellow-servant with the superintendent of construction and the foreman of a bridge gang, both of whom were present and engaged in supervising and directing the work on the bridge. These

latter employes represented the principal in an entirely different line of employment from that in which the plaintiff was engaged, were discharging a positive duty of the master to provide a safe and suitable place and structures in and upon which its employes were to do their work—*Union Pacific Railway Co.* v. *O'Brien*, 161 U. S., 451, and cases cited in the opinion—and in discharging that positive duty they and not he were the representatives of the defendant. Their action, so far as that work was concerned, was the action of the defendant."

St. Louis Railway Co. v. *Furry*, 114 Fed., 898, arose under a statute of Arkansas, as follows (p. 899):

"Sec. 6248. All persons engaged in the service of any railway corporations, foreign or domestic, doing business in this state, who are entrusted by such corporation with the authority of superintendence, control or command of other persons in the employ or service of such corporation, or with the authority to direct any other employe, in the performance of any duty of such employe, are vice-principals of such corporation, and are not fellow-servants with such employe.

"Sec. 6249. All persons who are engaged in the common service of such railway corporations, and who, while so engaged, are working together to a common purpose, of same grade, neither of such persons being entrusted by such corporations with any superintendence or control over their fellow employes, are fellow-servants with each other; provided nothing herein contained shall be so construed as to make employes of such corporation in the service of such corporation fellow-servants with other employes of such corporation engaged in any other department or service of such corporation. Em-

> ployes who do not come within the provisions of this section shall not be considered fellow-servants."

Under this statute the court held that those who had control of the movement of trains were not fellow-servants of a fireman engaged in the operation of the train.

In *Railroad Co.* v. *Otstott*, 212 Ill., 429, it was held that the association between a hostler of an engine and a section man was purely accidental; that their duties at the time of the accident did not bring them into such habitual association with each other that the court could say, as a matter of law, that they were fellow-servants.

In *Rolling Mill Co.* v. *Johnson*, 114 Ill., 57, the court held that a laborer engaged in loading a car was not a fellow-servant of a train crew which backed a string of cars against the car in which he was working and injured him, the court holding:

> "Of course where there is no right or principle to take measures to avoid the negligent acts of another without disobedience to the orders of his immediate superior, the doctrine can have no application."

But in the case at bar the deceased did have the right and did take measures to influence the conduct of the train crew by placing the flag on the track as a signal and warning of danger.

Railway Co. v. *Rice*, 144 Ill., 227, arose upon an instruction which the court held was properly refused.

So in *Gathman* v. *Chicago*, 236 Ill., 9. There was nothing to charge plaintiff with any knowledge that

he while at work as a machinist might be injured by the negligence of the bridgetender in raising the bridge.

FINALLY.

In the case at bar Fetta's employment required him to work in the repair yard of the defendants in error upon damaged cars, which the switching crew brought into the yard and which they removed from the yard after they had been repaired. Thus he was brought continuously into contact with those operating the cars and must be regarded as having foreseen that he would be exposed to the negligence of those bringing the damaged cars into the yards for repairs, and removing them after he and the other car-repairers had repaired them.

It is most clear that Fetta and the engine and switching crew, through whose negligence he was killed, were servants of a common master and though not engaged in the same identical work, they were both employed to perform duties tending to accomplish the same general purposes. The services of Fetta in repairing the damaged cars were just as important to the proper movement of trains as those of the engine and switching crews charged with the duty of bringing in the yard damaged cars and taking them out after Fetta and the other car-repairers had finished their work upon them. The services of each in his particular sphere were directed to the accomplishment of the same general end. They were, therefore, fellow-servants, and I

respectfully suggest the question certified should be answered in the affirmative.

Respectfully submitted.

GEORGE W. KRETZINGER,
Attorney for Defendants in Error.